

PERSONNEL BOARD

May 19, 2005

MEETING

Meeting was held Thursday, May 19, 2005, City Council Chambers, County-City Building, Lincoln, Nebraska.

Members present: Holly Burns, Sarah Jones, Maggie Stine, Pat Borer. Member absent: Ed Wimes. Personnel Department resource staff attending: Karen Eurich.

The meeting was opened at 8:10 a.m. by Chair Maggie Stine.

It was moved by Sarah Jones and seconded by Pat Borer to approve the minutes of the January 20, 2005 meeting as presented. Voting yes: Sarah Jones, Maggie Stine, Pat Borer. Absent for vote: Holly Burns.

Agenda Item 1 was the request to create the classification 2214 Economic Development Specialist (A12). John Cripe of the Personnel Department explained this request to the Board. This class is being created for the Urban Development Department at the Department's request. This classification will oversee the economic development programs and projects of the Urban Development Department. An employee will be reallocated into this position upon approval. Following discussion, it was moved by Pat Borer and seconded by Sarah Jones to approve the class as presented. Motion unanimously carried by roll call vote.

Agenda Item 2 was the request for appeal hearing from Cindy Lugan — Finance/Information Services. Connor Reuter represented the City and Gary Young of Keating, O'Gara, Davis, and Nedved represented Cindy Lugan. The proceedings were recorded by Marcy Konzak of J.S. Wurm & Associates and are on file in that office. Connor Reuter of the City Attorney's Office objected to the Board hearing the matter as it is a workers compensation issue and workers compensation statutes are an employee's sole remedy for work related injuries. Gary Young responded to the objection. Chair Maggie Stine overruled the objection. Connor Reuter informed the Board of a stipulation agreement between the two attorneys in regards to the use of words like "disability" or "accommodation" are not being used for purposes of ADA, but lack of any better words in the English language. There were twenty-three exhibits offered into the record. Gary Young objected to a portion of exhibit number 12 being offered. It was ruled by Chair Maggie Stine that the exhibit will not be used for settlement purpose but will be received into the record for review purposes. Later in the meeting, Gary Young offered a replacement for Exhibit 10, and was accepted. Witnesses called: Don Herz, Will Gross, Robin Mulder, Cindy Lugan, Rod Metcalf, Pat Kant, Don Taute, Randy Ober, Doug Thomas. Following discussion, it was moved by Pat Borer to deny the appeal for the employee's inability to perform lifting functions of the position. Motion died due to lack

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of a second. Following discussion, it was moved by Holly Burns and seconded by Sarah Jones to grant the appeal because the City did not prove just cause for the termination. Voting yes: Holly Burns, Sarah Jones, Maggie Stine. Voting no: Pat Borer.

Agenda Item 3 was the request for appeal hearing from Richard McLaughlin — Mayor's/Aging. Chair Maggie Stine read into the record an email from Don Taute relaying a phone conversation with Mr. McLaughlin and his desire to withdraw his appeal. Don Taute also appeared before the Board verifying the phone conversation he had with Mr. McLaughlin and the withdrawal of his appeal.

There being no further business, the meeting adjourned at 5:15 p.m.

The next scheduled meeting is tentatively set for Thursday, June 16, 2005.

Karen Eurich
Personnel Operations Specialist

PC: Joan Ross, City Clerk
 Cindy Lugan
 Richard McLaughlin

2005 JUN 7 AM 10 37

BEFORE THE PERSONNEL BOARD OF THE CITY OF LINCOLN

IN THE MATTER OF THE APPEAL)
 OF CINDY LUGAN)
)
)

FINDINGS OF FACT
 AND ORDER

From December 13, 1984 to February 28, 2005, Cindy Lugan was employed with the City of Lincoln as a Computer Operator, initially as a Computer Operator I, and later as a Computer Operator II. On February 28, 2005, Cindy Lugan was terminated from her employment with the City of Lincoln, for the reason that the City believed that Ms. Lugan was incompetent to perform the essential duties of her position.

Ms. Lugan properly filed a timely appeal of her termination on March 3, 2005, pursuant to the procedures provided for in the Bargaining Agreement between the City of Lincoln and Ms. Lugan's collective bargaining group, National Association of Government Employees, R9-38 (hereinafter "NAGE").

This appeal came before the Board for the hearing on the appeal of Cindy Lugan on May 19, 2005, pursuant to our jurisdiction to review terminations pursuant to Lincoln Municipal Code § 2.76.465. Connor Reuter, Assistant City Attorney appeared on behalf of the City of Lincoln. Gary L. Young appeared on behalf of Ms. Lugan.

At the outset of the hearing, the City of Lincoln made an objection to the hearing proceeding, on the basis that the City of Lincoln believed that the Personnel Board did not have jurisdiction to address the appeal, because the basis for the termination was that Ms. Lugan was not capable of performing the full duties of her position, and there was a pending workers compensation case regarding Ms. Lugan's injury. The objection was overruled. The Personnel Board has jurisdiction to address the appeal pursuant to Lincoln Municipal Code § 2.76.465, which provides as follows:

Any regular employee who has been terminated may appeal for a hearing before the Personnel Board.

Exhibit 10. Furthermore, Article 8, Section 6 of the Bargaining Agreement between NAGE and the City of Lincoln provides that an employee of the City of Lincoln may only be dismissed for cause, and the parties have agreed that the forum for any appeal of a termination is before the Personnel Board. Exhibit 9.

At the outset of the hearing, the parties stipulated that certain exhibits could be admitted without objection, including Exhibits 1 through 23. Mr. Young objected to the inclusion of one page of Exhibit 3, a February 10, 2005 letter from Ms. Lugan's workers compensation attorney, Rolf Shasteen, to the City of Lincoln, on the basis of relevance, and

on the basis that the letter constituted settlement negotiations between the parties. The objection was overruled with respect to all matters in the letter that were not regarding settlement negotiations, and granted with regard to all matters in the letter that were regarding settlement negotiations. Mr. Young also requested that he be permitted to provide a certified copy of Exhibit 10 as a substitute for Exhibit 10 when he received it later in the hearing. The City of Lincoln had no objection to this request, and the Board granted the request. Later in the hearing, Mr. Young substituted a certified copy of the Personnel Code for the original Exhibit 10, without objection. All Exhibits were received.

The parties also entered a stipulation for the record. The parties agreed that while counsel the parties might, from time to time, use the term "reasonable accommodation," the parties were not intending to use this with reference to its technical meaning under the terms of the Americans with Disabilities Act, and that the parties were not intending that the Board address the question of whether the City had complied with the ADA in its termination of Ms. Lugan. The stipulation was received.

The City of Lincoln called the following witnesses: Don Herz, Will Gross, Randy Ober, Robin Mulder, Doug Thomas, & Bill Kostner. Following these witnesses, the City rested. Cindy Lugan called the following witnesses: Cindy Lugan and Rod Metcalf. Ms. Lugan rested. The City called Don Taute and Pat Kant as rebuttal witnesses. The parties were permitted to make closing arguments.

The Board then entered into deliberations. Following deliberations, Board member Pat Borer moved to deny the appeal. The motion failed for lack of a second. Member Holly Burns moved to grant the appeal, on the basis that the City did not have cause to terminate Ms. Lugan's employment. The motion was seconded by Member Sarah Jones. The Board discussed the motion. Following the discussion, the Board voted to approve the motion, 3-1.

The Board finds that the City of Lincoln did not have just cause to terminate Ms. Lugan, because Ms. Lugan is competent to complete the essential duties of her position with reasonable modifications, as required City of Lincoln Administrative Regulation AR-19, which provides as follows:


If the employee can do their essential job functions with some modifications, the City will make reasonable efforts to accommodate the employee.

Exhibit 4. Ms. Lugan is unable to lift 50 pound boxes. However, the evidence established that the modifications that the City of Lincoln has been permitting Ms. Lugan to utilize during her period of light duty allow her to complete the essential duties of her position in spite of this limitation, and that these modifications place only a very small burden on the City. We find that these modifications are within the "reasonable efforts" requirement of AR-19. Therefore Ms. Lugan can complete her essential job functions with some

modifications that require the City to only make reasonable efforts to accommodate her employment. Accordingly, the City did not have cause to terminate Ms. Lugan.

THEREFORE, the Appeal of the termination is granted. Ms. Lugan's termination is reversed. and the Department shall reinstate her employment, and return to her any and all wages and other benefits of employment that she has been denied during the period of the termination until she is reinstated.

SO ORDERED.



Maggie Stine, Chairperson